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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784
Petitioner,

v.

CARL W. STOTTS, et al.,
Respondents,

MEMPHIS FIRE DEPARTMENT, et al.,
Petitioners,

v.

CARL W. STOTTS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE OFFICERS FOR JUSTICE; INTERNATIONAL ASSOCIATION OF BLACK FIREFIGHTERS—SAN FRANCISCO CHAPTER; THE BLACK AGENDA COUNCIL; THE ASSOCIATION OF NORTHERN CALIFORNIA BLACK WOMEN LAWYERS; THE WILLIAM HASTIE LAWYERS ASSOCIATION; THE CHARLES HOUSTON BAR ASSOCIATION; THE KAPPA ALPHA PSI FRATERNITY; BLACK WOMEN ORGANIZED FOR POLITICAL ACTION; THE WILEY MANUEL LAW FOUNDATION; THE NATIONAL BAR ASSOCIATION; AND THE CALIFORNIA ASSOCIATION OF BLACK LAWYERS AS AMICI CURIAE

IN SUPPORT OF RESPONDENTS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 679 F.2d 541 (1982).

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254 (1). The Court of Appeal's judgment was entered on May 7, 1982. A petition for a Writ of Certiorari was filed on August 4, 1982 and was granted on June 6, 1983.

CONSENT FOR FILING

This amici curiae brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF AMICI CURIAE

The common factor linking all amici in this brief is their strong commitment to the protection and advancement of the civil rights of minorities. The instant case involves a District Court's exercise of discretion to prevent institutionalization of past discriminatory employment practices. Amici believe that this appeal is moot, but in the event that the Court reaches the merits, it is imperative that it affirm the District Court's authority to modify the consent decrees in the way it did to prevent the seniority system from eradicating an affirmative action plan. In this time of deep recession and decreasing economic resources, black Americans, as well as other minority groups, are already experiencing a disproportionately high level of unemployment and economic dispair. These groups cannot afford to undergo, and indeed they should not be required to undergo, layoffs which would not only eliminate recently acquired civil rights gains, but also would reinstate the discriminatory status quo ante. Hence, amici's interest in the outcome of this case is substantial.

Officers for Justice is an organization comprised of minority members of the San Francisco Police Department. It was formed to address the issue of minority underrepresentation in the San Francisco Police Department and to combat discrimination aimed at those minorities who are members of the

police force. The organization has been involved in landmark litigation aimed at desegregating the San Francisco Police Department. Specifically, it has itself obtained a consent decree providing for affirmative action in the hiring and promotion of police officers in San Francisco. The preservation of the remedial impact of consent decrees designed to eliminate the present effects of past discrimination is of continuing and vital concern to this organization.

The International Association of Black Firefighters—San Francisco Chapter—is an organization of black professional firefighters which recruits blacks into the fire department, assists them in achieving promotions within the department, and makes fire services more relevant to the needs and aspiration of blacks and other minority citizens within San Francisco.

The Black Agenda Council, established in 1982, is a San Francisco network of elected and appointed officials representing more than 30 different black organizations. The Council is concerned with all issues affecting blacks in San Francisco and across the country. It regards the issue of black employment to be of paramount concern.

The Association of Northern California Black Women Lawyers represents the interests of black women lawyers. The Association is vitally concerned with the advancement of all minority Americans.

The William Hastie Lawyers Association, an organization of San Francisco-based black attorneys, includes equal employment opportunities for black Americans as one of its primary goals. Named after the late Judge William Hastie, the bar association is actively involved in protecting the civil rights of minorities.

The Charles Houston Bar Association, the oldest association of black attorneys in Northern California, was founded in 1955. The Association has filed a number of amici briefs before this Court on a variety of issues affecting the legal rights of the black community. Named after one of the most distinguished deans of the Howard University School of Law, the Association

strives to use the talents of black attorneys to advance the general interests of black Americans and to ensure that equal justice is a reality for them rather than an unfulfilled dream.

Kappa Alpha Psi Fraternity is an organization of some 80,000 black Americans concerned with all aspects of minority affairs in this country. Founded in 1911 it has more than 500 Chapters throughout the nation and it has been long active in struggles aimed at enhancing the lot (economic and otherwise) of black Americans. Kappa Alpha Psi fervently believes that the future of consent decrees, designed to alleviate the effects of past discrimination, is of critical importance to its membership and to all black Americans.

Black Women Organized for Political Action is a group of 800 women who advocate for progressive change for the betterment of black people in this society. Since 1970, it has been actively involved in issues of vital interest to the black community including employment discrimination.

The Wiley Manuel Law Foundation was founded in 1982 for the purpose of addressing legal issues of concern to the black community. The elimination of employment discrimination is an issue which the Foundation views as critical to black Americans.

The National Bar Association, founded in 1925, is a professional membership organization which represents more than 10,000 black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the importance of affirmative action as a means of solving America's racial problems.

The California Association of Black Lawyers consists of seven affiliates throughout California and represents the majority of black lawyers in the State. Among the purposes of the Association is the vigorous defense of voiceless black people. The Association is also acutely interested in ensuring that the laws of this nation are enforced so as to guarantee that all remnants of past discrimination are eradicated.

Amici's collective involvement in efforts to ensure equal employment opportunity for minority Americans and their belief that the District Court's modification of the consent decrees herein was an essential step in the process of realizing this goal has prompted this brief in support of Respondents.

STATEMENT OF THE CASE

In 1974, the United States Department of Justice commenced an action against the City of Memphis (City) under Title VII, 42 U.S.C. § 2000e et. seq., 42 U.S.C. § 1981, the Fourteenth Amendment and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C § 1221 et. seq. alleging that the Memphis Fire Department (Fire Department) and various other City agencies discriminated in their hirings and promotions. Although it originally denied the allegations, the City later agreed in 1974 to settle the litigation by a consent decree.

Carl W. Stotts, a black male employee of the Fire Department, on February 16, 1977, filed a class action lawsuit alleging that the Fire Department's hiring and promotion policies violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000a, et. seq. and 42 U.S.C. § 1981 and § 1983. The complaint accused the Fire Department of maintaining racially discriminatory hiring and promotional practices. Fred Jones, a black person, in 1979 also filed an action against the City alleging that the Fire Department had denied him a promotion solely because of his race. The *Jones* and *Stotts* cases were consolidated and set for trial.

In 1980 the parties entered into a consent decree which was approved by the District Court. The expressed purpose of the decree was to remedy the effects of past discriminatory hiring and promotional practices of the Fire Department as they impacted blacks. Jurisdiction was expressly retained by the District Court to effectuate the purpose of the decree.

An unanticipated economic crisis was experienced by the City in April 1981, which required layoffs and demotions in various City departments. The layoffs and demotions were to be

based on strict seniority. Layoffs under the seniority system, as applied to the Fire Department, would have virtually eliminated the affirmative action gains under the 1974 and 1980 decrees.

On May 4, 1981, Respondents applied for and were granted a temporary order restraining the City from laying off or reducing in rank any minority employee in the Fire Department. An evidentiary hearing was held by the District Court, and the City was ordered not to implement any layoff policy based upon seniority if such policy would decrease the percentage of blacks in several job classifications in the Fire Department. The City later proposed and the District Court approved layoffs and demotions that included a proportionate number of blacks and whites. Both the City and the Union appealed; however, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's modification of the consent decree to enforce the stated purpose of maintaining black representation in the Fire Department. By November 1981, all laid off employees were reemployed by the Fire Department.

QUESTION PRESENTED

Whether a District Court abuses its discretion by modifying a consent decree to prevent proposed layoffs and demotions of minority firemen in order to preserve the purpose of an original consent decree designed to eliminate the effects of past discrimination?

ARGUMENT

I

THIS APPEAL IS MOOT

A case is moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). See also, *Murphy* v. *Hunt*, 455 U.S. 478 (1982). In

Weinstein v. *Bradford*, 423 U.S. 147, 149 (1975), the Court recognized that if a case is "capable of repetition, yet evading review" it may not be moot. But, according to the Court, there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining parties. *Weinstein*, *supra*, at 149. That level of probability is not present in this case.

On this appeal, Petitioners argue that the District Court's modification of its original consent decree infringed upon their rights under the seniority system by causing layoffs in 1981 in a manner inconsistent with the established seniority system. Subsequently, all laid off employees were reemployed by the Fire Department. Therefore, the issues presented by this appeal are no longer alive; and there is no evidence in the record to show that these employees are again likely to be laid off because of modifications of the consent decrees.

Petitioners' position is that the District Court's modification of the city-wide seniority policy not only required the City to layoff and reduce in rank white senior incumbent employees in order to maintain a racially balanced Fire Department, but also that this alteration of the seniority system was illegal and that they were entitled to have their jobs restored. This is precisely what has occurred. See *Defunis* v. *Odegaard*, 416 U.S. 312, 316-317 (1974). Since the District Court's order has been completely fulfilled, no party is currently suffering any adverse consequences from that order which was totally consistent with a trial court's role in managing consent decrees. Petitioners are now in essence requesting this Court to rule on a matter that is no longer of controversy.

A consent decree is a unique instrument that represents numerous hours of negotiations and concessions from all parties in an atmosphere of compromise. The District Court is in the unique position of evaluating the good faith of the parties, the incentives necessary to make parties comply with the terms of the consent decree and the most effective methods to modify a consent decree in light of changed circumstances. The District Court in the instant case exercised its discretion in light of all the evidence in a manner designed to best achieve the goals of

the consent decree. In effect, the District Court's modification ordered the City to maintain black representation in the Fire Department. The City, responding to the court's order, did just that. But in so doing, the City was able to find funds necessary to keep the black firefighters as well as the white firefighters, and therefore alleviate the necessity of laying off any firefighters. Consequently, the court's order has been carried out, the City has maintained its minority hiring and promotional levels and the City managed to do this without laying off any firefighters.

Given the important public interest in maintaining the integrity of consent decrees and encouraging settlement of Title VII lawsuits, there is no reason to overreach the facts of this case and decide an issue which is not squarely presented to this Court. *Cf. Sosna* v. *Iowa*, 419 U.S. 393 (1975).

II

COURT ENFORCEMENT OF AFFIRMATIVE ACTION IN TIMES OF SHRINKING ECONOMIC RESOURCES ENCOURAGES EMPLOYERS TO PROVIDE JOBS FOR MINORITIES AND NON-MINORITIES ALIKE.

It is important to note that after courts in Boston and Memphis preserved the integrity of affirmative action orders, through modifications that prevented the percentages of minorities from being reduced as the result of layoffs, members of both minority and non-minority groups were laid off. But, in both cities all minority and non-minority alike who had been laid off due to budgetary problems were rehired. This fact rendered the appeal in the *Boston Firefighters* case moot (*Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP*, ____ U.S. ____ 51 U.S.L.W. 4566 (5/16/83)) and should as previously argued render the appeal in this action likewise moot.

An important lesson is taught by the experiences in Boston and Memphis. That lesson is that when municipalities are forced to take seriously the notion that affirmative action goals cannot be abrogated by adverse economic circumstances, they

tend to find ways of employing everyone. When the judicial system, the ultimate protector of the rights of minority citizens, makes it clear that Title VII will be enforced to fully integrate the work force and will not be ignored in times of shrinking economic resources, society seemingly takes that instruction seriously and somehow is able to find enough money to hire everyone as demonstrated in Boston and now in Memphis. Thus, by rigorously enforcing Title VII, the courts help to ensure that the Congressional intent of opening up the work force for minority workers is carried out.

In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), this Court eloquently stated the rationale for Title VII—a rationale which remains valid today:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Id.*, at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7279-7280 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. See 110 Cong. Rec., at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark). As a consequence "the relative position of the Negro worker (was) steadily worsening. In 1947 the non-white unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. *Id.* at 202.

Municipalities such as Boston and Memphis who enter into consent decrees to remedy the effects of past discrimination should not be given the opportunity to negate their obligations in the event of layoffs by employing seniority systems which destroy the effects of the consent decrees. If such practices are permitted then Title VII's relief is illusory at best. For, as the

Weber Court pointed out, "unless blacks (are) able to secure jobs which have a future" (Id. at 203) the integration of blacks into the mainstream of society will not be achieved:

> Accordingly, it was clear to Congress that "(t)he crux of the problem (was) to open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed. *Id.*, at 203.

Strong, firm, and unyielding adherence to the concept of full integration of the workforce and the workplace requires that courts be permitted to modify consent decrees in ways which do not result in the decimation of the advances made by minority people. To be sure, society is currently experiencing economic contraction. But, if this Court continues its strong support of the concepts embodied in Title VII and other anti-discrimination statutes by giving a clear signal to employers and the public at large, that members of minority groups will not bear a disproportionate burden in these times of economic hardship, cities like Memphis as well as other employers will find ways to incorporate minorities into the job market even in times of shrinking economic resources.

Finally, it should be noted that, in unilaterally selecting the job classifications in the Fire Department which would be affected by the layoffs, the City chose those classifications where minorities had recently made the most gains under the affirmative action provisions of the 1974 and 1980 decrees. *Stotts* v. *Memphis Fire Department*, 679 F.2d 541, 563 (1982). But, after the District Court held that the decrees could not be negated in this manner and that minorities would remain in the Fire Department, a means was found by the City to reemploy all the laid off workers. Without the modified consent decrees, it is highly unlikely the City would have been motivated to reemploy all of the laid off employees. Black firefighters undoubtedly would have remained laid off.

III

THE DISTRICT COURT HAD INHERENT AUTHORITY TO MODIFY THE ORIGINAL CONSENT DECREES.

A. The "Four Corners" Test Is Inapplicable In A Case Such As This Where The Proceeding In The Lower Court Was One To Modify The Consent Decree.

A trial court's authority to modify a consent decree upon a showing of changed circumstances has been repeatedly affirmed by this Court. *United States* v. *United Shoe Machinery*, 391 U.S. 244 (1968); *System Federation* v. *Wright*, 364 U.S. 642 (1961); *Chrysler Corporation* v. *United States*, 316 U.S. 556 (1942); *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). This Court very early recognized that a court may modify a consent decree whenever changed circumstances have turned the decree into "an instrument of wrong." *Id.* at 115.

A consent decree is not to be read as "an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." *Id.* at 115. Thus, a court may exercise discretion to modify the terms of a consent decree whenever a change of circumstances, "whether of law or fact" so warrants. *System Federation* v. *Wright, supra*, at 64.

Particularly where, as here, the District Court has expressly reserved the right to modify a consent decree, a showing that circumstances have risen that threaten to undermine the objectives of the consent decree is sufficient to withstand a challenge to the trial court's authority to modify the decree. *U.S.* v. *Swift, supra*, at 115. *See also Chrysler Corp., supra*, at 562; *Brown* v. *Neeb*, 644 F.2d 551, 557 (6th Cir. 1981).

The 1980 consent decree in the instant case had the stated purpose of remedying the adverse effects of past hiring and promotional practices. The decree expressly retained jurisdiction in the District Court "for such further orders as may be necessary or appropriate to effectuate the purposes of this decree." *Stotts* v. *Memphis Fire Department, supra*, at 548.

After a full evidentiary hearing, the District Court found that "the proposed layoffs would have a devastating and retrogressive effect on the affirmative action mandated in the 1974 and 1980 Decrees." *Stotts, supra*, at 563. These findings have not been challenged.

Under other similar circumstances, where a modification has been made after a full evidentiary hearing, this Court has stated "that the test to be applied in answering this question [whether trial court's modification was proper] is whether the change served to effectuate or to thwart the basic purpose of the original consent decree." *Chrysler Corporation, supra*, at 562 (citing *Swift*). In light of the express purposes of the 1974 and 1980 decrees, and the adverse impact the layoffs would have had on progress thereunder, modification clearly promoted the objectives of the original decrees. In other words, modification was required to prevent those decrees from being rendered meaningless.

In spite of authority requiring a determination of whether the purposes of a decree are affected by a modification, Petitioners assert that the District Court's modification constituted clear error because the court went outside the "four corners" of the consent decrees and improperly looked to the purposes of the decrees. Petitioners rely on *United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); and *Hughes* v. *United States*, 342 U.S. 353 (1952), for the proposition that a decree itself "cannot be said to have a purpose." Such reliance, however, is badly misplaced because neither *Armour*, *Atlantic Refining*, nor *Hughes* involved, as this case does, a proceeding to modify a consent decree. Instead, those cases involved actions based on a claim that the *terms* of the decree had been violated. And, in those cases, this Court merely held that the construction of the decree urged by the Government in its attempt to prove a violation was inconsistent with the express terms of the consent decree.

Moreover, Petitioners' reliance on *Armour*, *Atlantic Refining*, and *Hughes* has already been foreclosed by this Court. In *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), this Court explained that resort to the "four corners"

language occurred in *Armour*, *Atlantic Refining*, and *Hughes* only after the Government had urged a construction not supported by the language of the decree. *U.S.* v. *ITT Continental Baking Co.*, *supra* at 235-36. Here, however, the question is not whether a construction of the original decrees supports a violation, but whether modification was proper.

Furthermore, it is significant to note that all of the above cases, including *ITT Continental*, either expressly or implicitly stated that the Government might have been able to obtain the construction it sought if it had done precisely what the Respondents here did—sought modification of the consent decrees. Specifically, in *Armour*, in the paragraph immediately preceding the oft-quoted one, this Court stated that the Government's argument "might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint." *U.S.* v. *Armour & Co.*, *supra* at 682 (footnote omitted). *Accord*, *ITT Continental*, *supra* at 233-34 n.8; *U.S.* v. *Atlantic Refining Co.*, *supra*, at 23; *Hughes* v. *U.S.*, *supra* at 357. Respondents in the present case followed the procedure approved by the Court in *ITT Continental*, *Armour*, *Atlantic Refining*, and *Hughes*. They properly alleged that changed circumstances required a modification. Accordingly, the District Court properly modified the decrees after an evidentiary hearing.

B. Failure To Modify The Decrees Would Have Permitted The Petitioners To Repudiate The Obligations Imposed Upon Them By The Consent Decrees.

When a city has undertaken, pursuant to a consent decree, to institute necessary steps to remedy disadvantages suffered by minorities as a result of past hiring and promotional practices, as the City of Memphis did, courts have held them to that obligation even in the face of asserted fiscal problems making compliance with the agreements difficult. Thus, in *Brown* v. *Neeb*, *supra*, the court rejected the City of Toledo's argument that it should be permitted to go through with proposed layoffs that would have significantly depleted the ranks of black and Hispanic firefighters in direct contravention of a consent decree

which imposed a duty on Toledo's Fire Department to attain certain ratios within five years. The *Brown* court reasoned that the object of the decree was to desegregate the fire department, and that the District Court had authority to prevent actions violative of Toledo's expressed commitment to that goal. *Brown* v. *Neeb*, *supra*, at 557. Similarly, in *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976), the court also rejected the argument that personnel reductions caused by a fiscal crisis would excuse the State Police from complying with affirmative action requirements agreed to in a consent decree. See also *Sarabia* v. *Toledo Police Patrolman's Association*, 601 F.2d 914 (6th Cir. 1979).

In the instant case, the City agreed to remedy the past hiring and promotion practices of its Fire Department. The original decrees embodied agreements between the parties that certain steps would be taken to improve minority representation in the Fire Department, including accelerated minority hiring. The decrees established a goal in this regard—i.e., minority representation in the department was to be increased until it approximated the level of minority representation in the City. The consent decrees were arrived at only after extensive negotiations, during which the City at no time demanded that the decrees include a provision that might excuse it from compliance in the event it experienced economic hardship. Nor did the City insist on a clause respecting layoffs. Rather, the City specifically promised that it would reach certain goals and would engage in certain hiring and promotion practices. Therefore, the District Court did not err in merely holding the City to its promise.

Strangely, the City now argues that the modification should not have been made because the *Respondents* failed to spell out what would happen in the event of layoffs. *Petitioners' Brief on the Merits*, at pp. 15-16. Even more strangely, the City asserts that the Respondents should have foreseen the layoffs, and should have insisted on a clause protecting the rights of the minorities hired under the consent decrees. Thus, Petitioners are contending that Respondents should have had foresight that the City itself did not have. This argument is without merit. For it is undisputed that the layoffs were unprecedented.

The real question here is whether the City should be held to fulfill the promises it made in the consent decrees. The City's commitment was made to increase minority representation in the Fire Department; and, just as it had begun to fulfill that commitment, it attempted to renege on it by asserting that a fiscal crisis existed. Nothing in the original consent decrees allowed repudiation of the City's obligations because of an asserted fiscal crisis. Furthermore, no provision limited the decrees to situations where the City is motivated by an intent to discriminate, or where there has been a finding of a violation of the decrees. Petitioners are in virtually the same position as the defendants were in *Swift*. And, in *United Shoe*, this Court stated that "*Swift* teaches that a decree may be changed upon an appropriate showing and it holds that it may *not* be changed in the interests of defendants if the purposes of the litigation as incorporated into the decree . . . have not been fully achieved." *U.S.* v. *United Shoe Machinery*, *supra*, at 248 (emphasis in original). Consistent with the teachings of *Swift*, this Court should not permit Petitioners to escape the obligations imposed by the consent decrees.

C. An Adjudication Of A Violation Of Law Was Not A Prerequisite To The District Court's Modification Of The Original Consent Decrees.

In no case where this Court has discussed the parameters of a District Court's authority to modify a consent decree on the grounds of changed circumstances has it imposed a requirement that an adjudication of a violation of law precede modification of the consent decree. The Petitioners do not, and cannot, point to such a case. In support of their argument that an adjudication of a violation of law is a prerequisite to a modification, the Petitioners rely on *Atlantic Refining* and *Hughes*. But, as demonstrated above, neither of those cases dealt with a District Court's authority to modify a consent decree.

Petitioners also cite *Fox* v. *United States Dept. of Housing*, 680 F.2d 315 (3d Cir. 1982), which did involve the propriety of a modification of a decree. In *Fox*, however, the parties sought modification in an area that was only collateral and peripheral to the primary obligation undertaken by the consent decree.

However, in the instant case the City agreed specifically to hire and promote minorities. Thus, the maintenance of black firefighters in the Fire Department goes to the very heart of this case, and the consent decrees could properly be modified to carry out those primary purposes. See *Brown* v. *Neeb*, *supra*, (Brown J., concurring) (court can modify a consent decree in light of changed circumstances if done to carry out the express purpose of a decree, even in absence of a determination of liability).

D. The District Court's Modification Of The Original Consent Decree Was Not Barred By Section 703(h) Of Title VII.

Contrary to Petitioners' arguments, this Court has not faced the issue of whether a bona fide seniority system can be modified to prevent erosion of affirmative action gains under a consent decree. However, the Court has unequivocally held that Section 703(h) of Title VII does not insulate seniority systems for all purposes. See *Franks* v. *Bowman Transportation Company*, 424 U.S. 747 (1976). In *Franks*, for example, the Court held that Section 703(h) was merely a definitional provision setting forth which employment practices are violations of Title VII and should not be read as a bar to relief otherwise appropriate under the Act. *Franks*, *supra*, at 758, 761-762. Following the principles set forward in *Franks*, this Court has repeatedly approved remedial modification of bona fide seniority systems. See *Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Zipes* v. *Transworld Airlines*, 455 U.S. 385 (1982).

Consistent with the principles of *Franks*, the District Court's action below merely maintained affirmative action gains made under the consent decree—a goal which already had been agreed to by all parties. Additionally, the District Court had specifically retained jurisdiction of the case for further orders to effectuate the purposes of the decree. Rather than being in conflict with Title VII, the Court's action was consistent with the public interest of encouraging settlements and fulfilling the goals of settlement agreements.

IV

HAVING AN INTEGRATED FIRE DEPARTMENT SERVES AN IMPORTANT GOVERNMENT INTEREST WHICH OUTWEIGHS THE RIGID MAINTENANCE OF A SENIORITY SYSTEM.

A. Integrated Protective Services Serve An Important Governmental Interest.

Any reasonable comparison of the benefit to be derived from the creation of a racially balanced Fire Department in the City of Memphis with the enforcement of seniority rights results in the conclusion that the public benefit is by far the most overriding consideration. Desegregation of this country's major institutions is a national policy of the highest priority. *Franks* v. *Bowman Transportation Co., supra.* Public entities such as protective service agencies and departments are especially important arenas for desegregation because of the nature and necessity of the services they provide. For example, the Memphis Fire Department is responsible for protecting the property and lives of the *public.* If it is to be effective in that endeavor, it must be representative of all segments of the population which it serves. The level of respect and cooperation that the public affords any protective service agency is usually a function of the public's perception of that agency. This "truism" has been judicially recognized in previous cases and by analogy may be applied to the instant case. This point was also made in relation to police officers by the court in ***Bridgeport Guardians, Inc.*** v. ***Members of Bridgeport Civil Service Commission,*** 482 F.2d 1333, 1341 (2nd Cir. 1973), cert. denied, 421 U.S. 991 (1975) when it stated that:

> [P]erhaps, the most critical consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal employment opportunities. This is a police department *and the visibility of the black patrolmen is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement* (emphasis added).

A few years later the court again in *Detroit Police Officers' Association* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979) cert. denied, 452 U.S. 938 (1981) explained the nature of the benefits to be derived from racially balanced protective service departments:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that *effective crime prevention and solution depends heavily upon public support and cooperation which result only from public respect and confidence in the police.* In short the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions (emphasis added).

It should be reiterated that the original consent decrees were designed to alleviate the massive racial imbalance in the Fire Department which was the result of discriminatory hiring practices. The layoffs threatened the objective of the original decrees—i.e., racial balance—and were not based upon criteria which considered the imbalance existing prior to the decrees.

B. Protective Service Employers Expectations Of Seniority Do Not Outweigh The Need For An Integrated Fire Department.

The fact that senior employees may have formed expectations concerning their seniority rights which went unfulfilled because of the District Court's action adds nothing to Petitioners' position. A similar argument was made and rejected in *Franks* v. *Bowman Transportation Co., Inc., supra.* There, an employer sought to avoid giving retroactive seniority to a class of discriminatees on the grounds that such relief would conflict with the economic interests of other employees. *Franks, supra,* at 773. This Court, rejected that argument:

> It is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would, if applied generally, frustrate the central "make whole" objective of Title VII. . . . We

find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. *Id.* at 774-75.

Here, Petitioners' vigorous argument that the District Court's modification of the consent decrees unduly interfered with the expectations of protective service employees is particularly unpersuasive given the fact that those expectations arose out of the discriminatory state of affairs which existed prior to 1974.[1] The court in *Baker* v. *City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), reached the same conclusion regarding an identical argument. There, white police officers challenged a voluntary affirmative action plan calling for realignment of seniority rights between white and minority officers. In rejecting the plaintiffs' claim that Detroit's action unduly interfered with their legitimate expectations, the court observed: "It is true that affirmative action upsets the expectations of white workers, *but such expectations are indeed tainted when they are based upon a legacy of discrimination.*" *Id.* at 1002 (emphasis added). The court went on to point out that white officers had received an unexpected "bonus" when the police department gave them unearned promotions in 1970 as part of the discriminatory conduct and it held that "[w]hite officers cannot reasonably complain when the Department, on a finding of past discrimination and operational need, decided to confer a 'bonus' on blacks in 1974 and subsequent years." *Id.*

Similarly, in the present case the Court of Appeals rejected the proposition that a consent decree which accelerated minority eligibility for promotions unduly interfered with the expectations of non-minorities. The Court of Appeals observed that "[a] simple reduction in the 'expectations' of non-minorities does not . . . necessarily make a consent decree unreasonable." *Stotts, supra*, at 556 and it went on to hold that the harm suffered by incumbent non-minority employees because of the promotional goal was deminimus:

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[1] Even five years after the 1974 decree, the employment situation in the Fire Department for blacks was still deplorable. For example: "In 1979, blacks constituted between 33 and 37 percent of the Memphis population. However, the Fire Department was only 10 percent black." *Stotts, supra*, 679 F.2d at 550. The past hiring and promotional policies of the City caused this tremendous imbalance in the hiring and promotion of blacks. *Id.*

> Non-minorities allege that the 1980 Decree's 20% promotion goal unduly interferes with their expectation of promotion. It appears, however, that the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively would have been significantly higher had the City's employment practices been nondiscriminatory. The 1980 Decree eliminated only *a portion* of the promotional expectations of non-minorities which were presumptively based on the City's discriminatory promotional practices. *Id.* (emphasis in the original).

Here, just as the white Police Officers in *Baker*, the expectations of white Fire Department employees are based upon a pre-decree situation caused by discriminatory conduct and the lingering effects of that situation. To the extent that the District Court's limitation on layoffs interfered with those expectations, it did not adversely affect any legally protected interest of white employees. As the Court of Appeals for the Second Circuit observed in discussing Title VII, "[i]f relief . . . can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2nd Cir. 1971). Accord, *Franks*, *supra*, 424 U.S. at 775.

There is an important national policy served by not allowing seniority rights to overrule affirmative action efforts instituted to rid society of the historical evils of racial discrimination. Petitioners argue as if the seniority rights of white protective service employees in Memphis accrued in a vacuum. They assume, and invite this Court also to assume, that their seniority rights were accumulated in a racially-neutral fashion. From this false premise, they conclude that the purportedly "neutral" seniority rights of white protective service employees outweigh the public interest in desegregating the Memphis Fire Department.

This argument overlooks the fact that, *but* for the discriminatory hiring practices which triggered this litigation and *but for* the continuing effects of that past discrimination, the distribution of seniority rights between white and minority Fire Department employees would be far different from that in existence in 1981. For as the Court of Appeals observed in its opinion below:

> It is unfortunate that the City engaged in the employment practices which precipitated the decree. However, nonminorities benefitted from, practiced, and acquiesced in those practices. The 1980 Decree is a reasonable means to correct the adverse effects which minorities shouldered as a result of those employment practices. *Stotts*, *supra*, at 559.

One of the *most* significant advantages conferred upon Petitioners as a group was their preferential position on the seniority lists which they would not have attained but for discrimination against minorities. The minority firefighters currently employed by the City of Memphis were the "last hired" for the sole reason that because of discriminatory hiring practices no appreciable numbers of minorities were hired prior to 1974. Thus, the disparity in starting dates between white and minority Fire Department employees is nothing more than the mirror image of the discriminatory conditions which existed in 1974.

In view of the foregoing, any comparison of the benefits to be derived by white employees from enforcement of their seniority rights on the one hand and the public benefit in having racially balanced fire departments on the other must result in the conclusion that the public benefit is by far the overriding consideration.

Measured against these factors, the interests of protective service employees in enforcement of their seniority rights do not support the relief they seek. A program of layoffs based upon strict seniority would benefit only white firefighters because it would fulfill their expectations which are based upon the discriminatory conditions existing prior to the consent decrees, and it would frustrate the City's need for a racially balanced Fire Department.

V

CONCLUSION

Amici curiae respectfully urge this Court to uphold the fundamental principle that seniority rights may not be used to bar the modification of a consent decree to alleviate the effects of past discrimination that it was originally designed to accomplish.

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Respectfully submitted,

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